



W.P.No.31240 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :19.11.2024

PRONOUNCED ON :29.11.2024

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

W.P.No.31240 of 2024

and WMP.Nos.33877 and 33878 of 2024

M/s.Canwork Amenities Private Limited,

Rep . By its Director,

Antony Tharu,

Having registered Office at

2/110A Karipayee Road,

Rajagiri Post, Ernakulam – 683 104.

Petitioner

...

Vs.

The Senior Divisional Mechanical Engineer,

Southern Railway,

Chennai.

... Respondent

Prayer: Writ Petition filed under Article 227 of Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records relating to the order dated 10.10.2024 in No.M/M/271/EnHM/MAS Station/E-421713 of the respondent herein and quash the same and consequently direct the respondent herein to forthwith consider the price bid of the petitioner for the work of “Mechanized cleaning contract at Puratchi Thalaivar Dr.M.G.R Central Railway Station for a period of four years (1460 days) under Tender No.GEM/2024/B/4867026, dated 17.04.2024 of the respondent herein.



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For Petitioner : Mrs.A.L.Gandhimathi
Senior Advocate
for M/s.L.Palanimuthu

For Respondent : Mr.A.Kumarakuru
Sr.PC (Southern Railway)

ORDER

The writ petition is filed challenging the order passed by the respondent rejecting the tender submitted by the petitioner in the technical bid stage.

2. The petitioner is a private limited company engaged in various contracts under the Southern Railway. The petitioner is one of the partners of a firm called Tharu and Sons having 80% of the share. The petitioner's parent firm namely Tharu and Sons had vast experience in carrying out various works for the respondents. The respondent invited tenders in Tender No.GEM/2024/B/4867026, dated 17.04.2024 for the work of “Mechanized cleaning contract at Puratchi Thalaivar Dr.M.G.R Central Railway Station” for a period of four years (1460 days). As per the tender conditions the bids will be considered in two stages. In the first stage technical bids submitted by the tenderers will be opened and only the price bid of the tenderers, who cleared the first stage of technical bid, will be considered in the second stage.



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The petitioner participated in the above tender and uploaded all the relevant documents in the prescribed manner. As per the tender conditions, weightage will be given to the previous work experience, turn over in the last three and current financial years, number of years in operation and size of work force. The bidders who score more than 60 marks are eligible to participate in the second stage of price bid.

3. The petitioner's bid was rejected as per the entry in GEM Portal on the ground, “Technically not qualified as per the tender conditions”. After acquiring knowledge about the same, the petitioner submitted a representation before the respondent on 10.10.2024 seeking clarification from the respondent on what ground the petitioner was disqualified, as the entry in GEM Portal was not clear. The respondent by impugned letter informed petitioner that the petitioner has not submitted any documentary evidence for required number of staff in the pay roll and hence his technical bid was disqualified. Aggrieved by the same, the petitioner has filed this writ petition.



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4. The learned Senior Counsel appearing for the petitioner submitted that work force on the rolls of the petitioner is only one of the condition for evaluation of the technical bid and even if the petitioner is not having required number of work force on its rolls, if the petitioner is able to score more than 60 points on the basis of other parameters its technical bid should be accepted by the respondent and hence the reason given by the respondent for rejecting the technical bid is erroneous. The learned Senior Counsel further submitted that the petitioner is owning 80% share in its parent firm of M/s.Tharu & Sons and hence it is entitled to take advantage of the credential of Tharu and Sons. It is submitted that Tharu and Sons has got 5,702 staff members in its rolls and the petitioner is entitled to 80% of the same namely 4562 and the said material fact has not been considered by the respondent. The learned Senior Counsel further submitted that even assuming the petitioner was not awarded any marks under the head of work force, based on its score under three other heads namely work experience, turn over and year of experience, the score of the petitioner is more than minimum requirement of 60.



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5. The learned counsel appearing for the respondent by taking this Court to the counter affidavit submitted that during technical evaluation it was observed that the petitioner scored only 46.41 marks well below the required minimum of 60 marks and therefore, the petitioner's technical bid was rejected. The learned counsel submitted that the credential of petitioner's parent firm cannot be taken into consideration as far as work force is concerned because the said personnel are in the pay rolls of the Tharu and Sons and not in the payrolls of the petitioner. It is submitted that as per the tender conditions, the required number of work force shall be available on the pay rolls of the bidder company. The learned counsel for the respondent further submitted that it may not be possible for the petitioner to utilise the services of the employees of Tharu and Sons, which may be engaged in its own business. The learned counsel further submitted that the petitioner placed his arguments by relying on GCC work 2022, but in the case on hand, the present tender is concerned with GCC services 2018.

6. A perusal of the affidavit and typed set of papers would suggest that the petitioner is having 80% of share in the parent firm of



M/s.Tharu and Sons. The Apex Court in ***Maa Nabadurga Construction Vs.***

Saroj Kumar Jena and others reported in ***2015 SCC Online SC 1933***

categorically held by relying on earlier decision in ***New Horizons Limited case*** that work experience of a parent company or the credential of the parent company can also be taken into consideration, while evaluating the work experience of the bidders. The relevant observation reads as follows:

9. We find that the matter is no more res-integra and is covered by the decision of this Court in New Horizons Limited (supra). In that case, the Court was considering whether the joint venture firm which had submitted a tender was entitled to have the experience of one of its constituents counted as the necessary experience required by the tenderer. The Tender Evaluation Committee had ignored the experience on the ground that the said experience was not in the name of Nabadurga Construction Limited but of its constituents and, therefore, New Horizons Limited (supra) did not fulfill the conditions about the eligibility of the award for the contract. This Court in para 23 of New Horizons Limited (supra) observed as follows:

“Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding



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experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration.”

10. This Court further observed that:—

“Once it is held that NHL is a joint venture, as claimed by it in the tender, the experience of its various constituents, namely, TPI, LMI and WML as well as IIPL had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of a prudent businessman.”

11. This Court was of the view that the experience of a joint venture is akin to the experience of a partnership and further observed as under:

“The expression “joint venture” is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of



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interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.

12. Having regard to the decision, we find that the Tender Evaluation Committee had rightly decided to take into account the experience of Shri Ramesh Das one of the partners of the appellant firm and on that basis held the appellant to be eligible.

13. Black's Law Dictionary, relied on by the learned counsel for the appellant gives the following meaning of "experience" as follows: "Experience. - A state, extent, or duration of being engaged in a particular study or work; the real life as contrasted with the ideal or imaginary. A word implying skill, facility, or practical wisdom gained by personal knowledge, feeling and action, and also the course or process by which one attains knowledge or wisdom.

14. It is clear that the view of the High Court that 'experience' is something which cannot be an asset of the firm and, therefore, not capable of being attributed to a firm is not correct. It is settled law that a partnership has been held to be a compendious name for its partners and that experience is a human attribute which does not form part of the assets or property of the firm in the usual sense. This is also obvious since it is not, and in any case not



capable of, distribution as assets; on the dissolution of the firm.

This Court in New Horizons Limited (supra) considered the extent of experience in a partnership as follows:

15. *“While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the person behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company.*

7. Therefore, it is clear that the work experience of the parent company can always be counted while evaluating the work experience of the tenderers. In the case on hand, the petitioner is a 80% share holder of parent firm M/s.Tharu and Sons and the said vast experience in executing various



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contracts will be helpful to the present tenderer. Therefore, there is no doubt, the petitioner is entitled to take the advantage of the credential of M/s.Tharu and Company as far as work experience is concerned.

8. A perusal of the counter affidavit would show that the petitioner has been awarded 46.41 marks in the technical evaluation by the respondent. The evaluation adopted by the respondent as mentioned in the counter affidavit is extracted below:

<i>Sl. No</i>	<i>Weightage</i>	<i>Technical Criteria</i>	<i>Document submitted</i>	<i>Marks obtained</i>
1.	20.00%	Previous work done (i.e Work experience)	These two certificate considered with the 80% value of the total completed value, as mentioned below; 1.The completed value is Rs.20,80,08,080.16 with penalty of Rs.87,24,116.00 (i.e 4.19%) for OBHS work in 12 Trains in Chennai Division. 2.The completed value is Rs.20,31,07,704.00/- with penalty of Rs.1,20,17,790/- (i.e., 5.92%) for OBHS work in 11 Trains at SRC Division. You have completed two projects valued at more than 40% but less than 50% of the advertised bid value. Hence, marks obtained 9.41 marks.	9.41



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Sl. No	Weightage	Technical Criteria	Document submitted	Marks obtained
2.	35.00%	Turnover (in last three and current financial year)	As per the sub clause (i) of Clause 2.6.1.2 of GCC service 2018, “ only audited balance sheet shall be considered ”. However the turnover for the financial year 2023-2024 is stated unaudited , therefore not considered. The total turnover is Rs.204.57 Cr which is more than the required turnover of 3 times of advertised bid value. Hence marks obtained 21 marks.	21
3.	20.00%	Numbers of years in operations	Your Company has been established on 30.03.2019 and operated their establishment since 6 years. Hence marks obtained 16 marks.	16
4.	25%	Size of workforce	As per tender document technical qualifying criteria “The bidder must have a minimum number of personnel (as defined by Railway Administration) on the organisation's pay roll” The bidder have organisation pay roll payroll 5 no's and 7 no's in the month of Feb'24 and March'24 respectively. Apart from this no documentary evidence was submitted for staff in pay roll of “M/s.Canwork Amenities Private Limited” which led to disqualification in “Size of workforce” criteria. Hence marks obtained 0 marks.	0
			Total scored	46.41

9. A perusal of the same would establish that the previous experience of the petitioner in its capacity as 80% shareholder of M/s. Tharu and Sons was also taken into consideration and in view of the penalty suffered



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at the rate of 4.19% and 5.92%, the petitioner was awarded only 9.41 marks under the head previous work experience. As far as the size of work force is concerned, the petitioner has got only 5 to 7 personnel in its pay roll. The learned counsel for the petitioner submits that the personnel in the pay roll of M/s.Tharu and Sons should be taken into consideration. The judgment relied on by the learned counsel for the petitioner in *Maa Nabadurga Construction case* only deals with the aspect whether the work experience of parent company can be taken into consideration or not. Counting the previous experience of the parent company is different from taking into consideration the work force of the parent company. The law permits that the credential of the parent company to be taken into consideration by the subsidiary company as far as work experience is concerned.

10. The Clause 2.1.3(4) of tender conditions clearly stipulates on what basis marks will be awarded to bidder during technical evaluation process under the head “work force”. The same is extracted below:

2.1.3. Technical bid criteria: Evaluation of Technical



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Criteria shall be as per give below table Bidders who qualify the above minimum eligibility criteria will be evaluated further for Technical criteria.

The bidder shall satisfy the following technical eligibility criteria by submitting documents in support of their claims along with the tender document.

Sl.No	Weightage	Technical Criteria	Documentation	Scoring
4.	25%	Size of workforce: The bidder must have a minimum number of personnel (as defined by Railway administration) on the organisation's pay roll.	EPFO Challan/bank account statement in support of available manpower (duly submitted to EPFO) in respect of the previous four quarters preceding the date of opening of BID should be submitted in support of their qualification. The maximum staff of the month during the past 12 months is taken for evaluation.	(a) 100 marks if the bidder's workforce on roll is greater than 3 times of the total workforce required in this Bid. (b) 70 Marks if workforce on roll is equal to or up to 3 times the total work force required in this Bid. (c) No marks if work force on roll deployed is less than the total work force required in this Bid.

11. In the considered opinion of this Court counting the work experience of parent company/undertaking for the purpose of evaluating technical bid of subsidiary company/under taking is entirely different from taking into consideration of employees in the payrolls of parent



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company/undertaking as employees of subsidiary company/undertaking. The

employees of parent company will be engaged in the tasks assigned to parent

company. If present work contract is awarded to petitioner, it may not be in a

position to utilize the services of employees of parent firm when they are

already engaged in the tasks assigned to parent firm in whose pay roll they are

found. Further, for the works assigned to the petitioner, payment will be

transferred to petitioner's account by the respondent. The petitioner may not

be in a position to pay salary to the employees in the pay roll of other

company/firm unless petitioner enters into an out sourcing agreement with

parent firm M/s.Tharu and Sons. Such out sourcing agreement for the

purpose of employing personnel to execute work is clearly against the terms

and conditions of the tender, because tender conditions clearly stipulate that

sufficient number of employees shall be in the pay roll of bidder and marks

will be awarded to bidder based on number of personnel available in their pay

roll. Therefore, the respondent is justified in denying any marks to the

petitioner under the head "work force". Since petitioner failed to get

minimum marks of "60" during technical bid evaluation, the respondent

rightly rejected it's technical bid. I don't find anything to interfere with



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decision of the respondent in rejecting technical bid of the petitioner.

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12. In view of the discussions made earlier, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

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Index : Yes / No
Speaking order : Yes / No
Neutral Citation : Yes / No
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To

The Senior Divisional Mechanical Engineer,
Southern Railway,
Chennai.



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S.SOUNTHAR, J.

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